



APPENDIX.

Final Hearing
May 16, 1945.

Paper No. 26

HSM:EM

In the United States Patent Office

Opposition No. 23,336

The Seven Up Company

v.

Wagner

Mailed
June 15, 1945

Application No. 449,594, Filed December 18,
1941, Published April 11, 1944

Fruit Preparation for Flavoring Ice Cream, etc.

Mr. John H. Cassidy for The Seven Up Company.

Messrs. C. A. Snow & Co., and Mr. Emory L. Groff for
Wagner.

This is an opposition in which each of the parties has filed a brief and was represented at final hearing. Each of the parties has introduced stipulated testimony in lieu of depositions.

The allegations contained in the notice of opposition relate to only the confusion in trade clause of Section 5 of the Act as a statutory ground for negating the right of registration claimed by the applicant.

Applicant seeks registration of the notation "Thumbs Up" as applied to "fruit preparation for flavoring ice cream, said preparation including melons and fruits, other than citrus fruits, cut into small pieces and mixed with their juices and nuts and syrup."

The opposer relies on some five registrations for the notations "Seven Up" and "7 Up" alone and together with certain designs as applied to a carbonated, nonalcoholic, noncereal, maltless beverage sold as a soft drink and flavors used in making the same.

[Here follows a discussion of alleged priority.]

* * * * *

The examiner is of the opinion, therefore, that in view of the somewhat indefinite and contradictory nature of applicant's record that he is not justified in concluding that applicant has had such prior continuous use as to entitle applicant to be held the prior user as between the parties. On the contrary, the examiner is of the opinion that the statutory evidence afforded by the registrations on which opposer relies, and ownership of which has been established, indicates that opposer is the prior user as between the parties.

As respects the goods, they appear to be specifically dissimilar. Applicant's product is a fruit and nut preparation used for flavoring ice cream, whereas opposer's product is a flavoring extract used in making soft drinks. Despite the specific differences, however, the goods of the parties are deemed to be very closely related in use and in trade appeal. Both are flavoring preparations used in flavoring products normally sold in soda fountains to the same customers for similar uses. It is the examiner's

opinion that by reason of this fact they are so nearly related in trade appeal as to constitute goods of the same descriptive properties within the meaning of the Trade-Mark Act.

As respects the marks, both are two-word notations wholly arbitrary in nature, having in common the word "Up." True they differ in the first word in each notation, but it seems to the examiner that where, as here, the goods are relatively inexpensive, purchased by all classes of customers and consumed in use the marks bear such near resemblance as to be likely to lead to confusion in trade.

As stated in the case of *Saxlehner v. Eisner & Mendelson Company* (93 O. G. 940; 179 U. S. 19; 1900 C. D. 362): "It is not necessary to constitute an infringement that every word of a trade-mark should be appropriated. It is sufficient that enough be taken to deceive the people in the purchase of a protected article."

Accordingly, the notice of, opposition is hereby sustained and it is further adjudged that the applicant is not entitled to the registration for which it has made application.

Limit of appeal: July 16, 1945.

A. D. Bailey,
Examiner of Interferences,
Room 2099-B.

June 15, 1945.